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July 5, 2016

VIA FEDERAL EXPRESS & EMAIL

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20436

Re: MUR 7072

Dear Mr. Jordan:

We are counsel to Representative Ami Bera, Ami Bera for Congress ("the Committee"), the Representative's principal campaign committee, and Jennifer May, in her official capacity as Treasurer (collectively, "Respondents"). We write in response to the complaint filed by Lori Van Hamersveld on May 16, 2016 ("the Complaint"). The Complaint takes issue with the timing and manner of Respondents' disposal of illegal contributions, even though Respondents disgorged the funds to the U.S. Treasury the same day that they were determined to be illegal in judicial proceedings, and even though the Commission has expressly permitted committees to disgorge funds to the U.S. Treasury in lieu of refunding them to the original donor. Moreover, Respondents did not know about the illegal contributions when they were made and, to this day, they still do not know the names of the individuals whose contributions were reimbursed, or the amounts or dates of those contributions. Because its allegations are factually flawed and are based on incorrect legal assertions that contravene Commission precedent, the Complaint must be promptly dismissed.

I. Factual Background.

This Complaint arises out of an incident that was recently brought to light on May 9, 2016, when the U.S. Department of Justice filed a criminal information (the "Information") against Representative Bera's father, Mr. Babulal Bera. According to the Information, during the 2010 and 2012 election cycles, Babulal Bera solicited a number of relatives, friends, and acquaintances to donate a total of \$268,726 to the Committee. Babulal Bera reimbursed the donors for their contributions partially or fully. See Complaint, Ex. A, ¶¶ 8,

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12. Babulal Bera pled guilty to making excessive contributions and to making contributions in the name of another on May 10. *See* Complaint, Ex. B.

The Respondents were unaware of Babulal Bera's conduct at the time that it occurred and only became aware of the specific violations when the Information was issued. Prior to this, in October 2015, Representative Bera was interviewed by the Department of Justice in connection with its investigation of Babulal Bera. During the interview, the Department of Justice asked Representative Bera questions about his father's fundraising activities. But, as is typically the case with criminal investigations, the Department of Justice did not disclose the full details of its investigation to the interviewee. This interview did not provide Respondents with any actionable information about Babulal Bera's activities that would have allowed them to immediately disgorge the illicit contributions. Representative Bera was not given a list of the specific contributors whose contributions were allegedly reimbursed, or the amounts or dates of those contributions.

Although the Committee had been alerted to the general possibility that it may have received improper contributions, the Committee lacked sufficient information to independently determine whether any of the contributions it had received were, in fact, reimbursed by Babulal Bera. To avoid any activity that could compromise the Department of Justice's investigation, Respondents did not talk to Babulal Bera or to the Committee's other donors about the matter. Moreover, Respondents did not maintain a comprehensive list of the contributions that had been raised by Babulal Bera in the past three election cycles and, in many cases, they had no basis to know whether a contribution had been raised by Babulal Bera; as the Information notes, in a number of cases, donors mailed their contributions directly to the Committee, rather than providing them to Babulal Bera for transmission to the Committee. *See* Complaint, Ex. A, ¶¶ 8, 12. Though Respondents asked the Department of Justice for more information about the investigation, this request was declined.

As a result, Respondents did not know the extent of the alleged reimbursements until the Information was issued on May 9, 2016, which indicated that \$268,726 of the Committee's contributions had been reimbursed, either wholly or partially, by Babulal Bera.¹ The Committee issued a check in this amount to the U.S. Treasury the very next day. A copy of the check is attached to this response as Exhibit A.

II. Legal Background and Analysis

"The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."

¹ The Plea Agreement, executed on May 10, 2016, indicated that there were over 130 improper contributions involving approximately 90 contributors. *See* Complaint, Ex. B, at A-1. Neither the Information nor the Plea Agreement indicated the names of the individuals whose contributions were reimbursed, the amounts of those individual contributions, or the dates on which those contributions were made, and this information is still unknown to Respondents.

Statement of Reasons, Commissioners Mason, Sandstrom, Smith & Thomas, MUR 4950 (Dec. 21, 2000); *see* 11 C.F.R. § 111.4(d). Moreover, “[u]nwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.” *Id.*; *see* Statement of Reasons, Commissioners Mason, Sandstrom, McDonald, Smith, Thomas & Wold, MUR 5141 (Apr. 17, 2002).

The Complaint alleges that Respondents violated the Act and Commission rules by (1) failing to timely dispose of Babulal Bera’s contributions and (2) disgorging the funds to the U.S. Treasury instead of refunding them. Both allegations fail this test and must be dismissed.²

A. Respondents Timely Disposed of the Improper Contributions

Commission rules require that the treasurer of a political committee must examine all contributions received for evidence of illegality. 11 C.F.R. § 103.3(b). If the treasurer determines at the time of receipt and deposit that a contribution appears to be legal but later discovers that it is illegal based on new evidence not available at the time of receipt and deposit, the treasurer must refund the contribution to the contributor within 30 days of the date on which the illegality is discovered. *Id.* § 103.3(b)(2). The Commission has found that the entering of a guilty plea for making contributions in the name of another triggers this obligation. *See* Advisory Opinion 1989-5.

In addition, though the rule does not expressly so provide, the Commission has advised that if a committee discovers sufficient evidence that creates doubt as to the legality of a contribution, the committee must use its best efforts to determine the legality of those contributions and, if the contributions cannot be determined to be legal, refund them. *See* Advisory Opinions 1995-19, 1991-39. In one opinion, the Commission determined that this duty applied when a donor was indicted for making contributions in the name of another, because an indictment is issued only if there is probable cause to believe that there is a violation. Advisory Opinion 1991-39. In another opinion, this duty was triggered when a reporter contacted a committee with specific allegations regarding reimbursed contributions, and subsequently published an article that contained evidence corroborating those allegations in the form of “specific assertions by some contributors . . . that they were reimbursed for their donations,” as well as “specific information as to the conduct of the alleged original contributor and other circumstances surrounding some of the donations.” Advisory Opinion 1995-19 (emphasis added). In that second opinion, the Commission found that the committee had a duty to investigate the contributions for which there were specific allegations and corroborating

² The complaint does not allege that Respondents took part in Babulal Bera’s activities – nor could it, as the Department of Justice has acknowledged that there is no indication that Respondents “knew of, or participated in, the reimbursements of contributions.” John Myers, ‘I have, in fact, done the crime’: Rep. Ami Bera’s father admits illegal campaign contributions, L.A. Times (May 10, 2016).

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evidence, but declined to impose a duty to investigate in cases where there were only general allegations of wrongdoing.

Respondents acted consistently with both standards. On May 9, 2016, Respondents first saw the Information and the specific violations alleged therein, triggering their obligation to investigate the legality of the contributions. Advisory Opinion 1991-39. On May 10, Babulal Bera executed a plea agreement with the Department of Justice, which triggered their obligation to refund or disgorge the contributions. Advisory Opinion 1989-5. That same day – only a day after the illegal contributions were described with any degree of specificity and the day that the illegality of the contributions was confirmed – Respondents disgorged an equivalent amount to the U.S. Treasury. Thus, they timely disposed of the contributions under 11 C.F.R. section 103.3(b)(2).

Respondents were not obligated to refund the contributions any earlier, nor could they have done so. Following Representative Bera's October 2015 interview, Respondents were aware of the Department of Justice's general, unproven *allegations* that Babulal Bera might have reimbursed contributions. But they were not provided with any specific evidence sufficient to create doubt about the legality of any specific contributions received by the Committee, so as to create a duty to investigate under Advisory Opinions 1995-19 and 1991-39. Unlike in Advisory Opinion 1995-19, there was no donor testimony or other information available to Respondents to corroborate the Department of Justice's allegations. And unlike in Advisory Opinion 1995-19, Respondents were not provided with specific information about the conduct of the original contributors whose contributions may have been reimbursed, the circumstances surrounding their donations, or the amounts or dates of the contributions, and when they requested additional information from the Department of Justice about the investigation, the request was declined. In fact, Respondents still do not know this information. Simply put, Respondents could not have disposed of the offending contributions until May 2016 because, until that point, they did not know the amount to refund or disgorge.

Though Respondents had no legal obligation to investigate the permissibility of the contributions until May 2016, they were naturally concerned by the allegations raised in the October 2015 interview. Accordingly, in an effort that reflects their commitment to the purposes of the Act, they took steps to determine whether the Committee had, in fact, received contributions made in the name of another and, if so, to identify the offending contributions. However, as described above, these efforts were unavailing. So as to not compromise the Department of Justice's investigation, Respondents did not talk to Babulal Bera or others about the contributions. And, though Respondents asked the Department of Justice for additional information, none was provided. Thus, the Complaint's allegation that Respondents should have – or could have – taken action before May 2016 is without basis.

Despite the plainly proper course of action taken by Respondents, the Complaint takes issue with the timeliness of the disposition of the funds, summarily concluding that Representative Bera's "claim that he was not aware of the illegality [at an earlier date] is plainly offense [*sic*] to logic." Complaint at 4. There is no factual basis for this assertion; instead, the

Complaint speculates that because the matter involved the Representative's family, the Representative would be aware of the conduct.³ To the contrary, Respondents were unaware of any possibility of wrongdoing until Representative Bera was interviewed by the Department of Justice in October 2015, and the Department of Justice itself acknowledged this fact at the news conference announcing the plea bargain. As U.S. Attorney Phillip A. Talbert stated:

Congressman Bera and his campaign staff have been fully cooperative in this investigation. . . . To date, there is no indication from what we've learned in the investigation that either the congressman or his campaign staff knew of, or participated in, the reimbursements of contributions.

Myers, L.A. Times (May 10, 2016).

And once Respondents became aware of the possibility of wrongdoing, they cooperated fully with the Department of Justice's investigation and avoided any action that would compromise it, such as discussing the matter with Babulal Bera or the Committee's other contributors. Therefore, the allegation that Respondents learned about the matter earlier from Representative Bera's family members is false.

In sum, when Respondents were alerted to the general allegations of impropriety in October 2015, they took the appropriate course of action by asking the Department of Justice for further information. The Department of Justice declined to provide that information, and Respondents could not do more without risking interference with the investigation. And, in May 2016, as soon as Respondents were provided with specific and actionable information that demonstrated the illegality and amount of the contributions, they promptly disposed of them. The Complaint's allegation that Respondents should have – or could have – acted earlier is meritless.

**B. Respondents Properly Disposed of the Improper Contributions
by Disgorging them to the United States Treasury**

Though 11 C.F.R. section 103.3(b)(2) provides that illegal contributions "shall" be refunded to the contributor within 30 days of discovering the contribution's illegality, the Commission has long permitted committees to remedy illegal contributions in other ways that achieve the rule's purpose. Before 1996, the Commission found that in cases where a contribution was found to have been made in the name of another in a collateral legal proceeding, the contribution was to be refunded to the true donor. *See* Advisory Opinions 1989-5, 1984-52. However, where there was an allegation that contributions were made in the name of another, but there was a dispute as to the identity of the true owner, the Commission permitted

³ In prior matters, the Commission has declined to infer discussions or other coordination between two individuals merely because they are related. *See, e.g.*, MUR 6277 (Kirkland); MUR 6611 (Ruderman).

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committees to disgorge the funds to the U.S. Treasury or to donate the funds to charity. Advisory Opinions 1995-19, 1991-39. With Advisory Opinion 1996-5, the Commission overruled Advisory Opinions 1989-5 and 1984-52, and found that, even in cases where the true source of the funds was known to the committee, the committee could either refund the illegal contribution or disgorge the contribution to the Treasury. Thus, the Act and Commission precedent plainly permitted Respondents to disgorge the improper contributions to the U.S. Treasury, instead of refunding them to Babulal Bera.

Despite this clear precedent, the Complaint argues that Respondents should have refunded the funds to Babulal Bera, relying on *Fireman v. United States*, 44 Fed. Cl. 528 (1999). But *Fireman* merely permitted a challenge brought by a donor seeking to recover donations from the United States government to pass the motion-to-dismiss phase in litigation brought against the government. It did not invalidate Advisory Opinion 1996-5 or create a substantive legal violation by the committee involved in that case. And, even if it had, it would not result in a violation in this case. Based on the Information and Plea Agreement, it is unclear whether Babulal Bera reimbursed the contributions in full or only in part. Therefore, as in Advisory Opinions 1995-19 and 1991-39, the Committee did not – and still does not – know the true owner of at least some portion of the donations involving Babulal Bera. Thus, even under the pre-1996 regulatory regime, the Committee's course of action was appropriate. Had the Committee refunded the full \$268,726 to Babulal Bera, it could have resulted in Babulal Bera receiving *more* money than what he had initially contributed, and risked violating the Act's prohibition on personal use. See 11 C.F.R. § 113.1(g)(1)(i)(I) (prohibiting salary payments to a member of the candidate's family unless the family member is providing bona fide services to the campaign).

III. Conclusion

For the reasons described above, the Commission should promptly find that there is no reason to believe that Respondents violated the Act, and close the file.

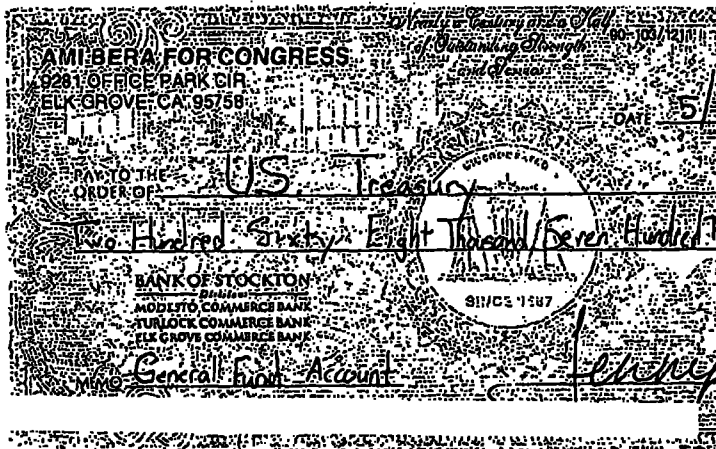
Sincerely,



Thomas A. Willis
Andrew Harris Werbrock
Counsel to Respondents

AHW:NL
Attachment
(00280254-2)

EXHIBIT A



May 10, 2016

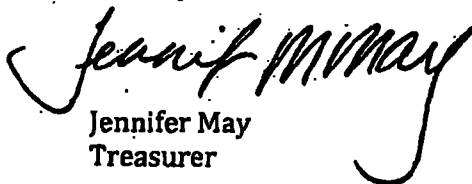
U.S Department of Treasury
Financial Management Services
Credit Accounting Branch
3700 East-West Highway
Hyattsville, MD 20782

To Whom It May Concern,

Enclosed please find a check for \$268,726 from Bera for Congress to the US Treasury.
Please place the funds in the General Fund Account.

If you have any questions, I can be reached at (202) 505-1657.

Thank you,


Jennifer May
Treasurer